

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 15 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

PAUL KADLEC and RACHEL KADLEC, )  
husband and wife; and DUANE HOWELL )  
and BRENDA HOWELL, husband and wife, )

Plaintiffs/Appellants, )

v. )

DANIEL DORSEY and SHERRI DORSEY, )  
husband and wife, )

Defendants/Appellees. )

2 CA-CV 2011-0163  
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication  
Rule 28, Rules of Civil  
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20076040

Honorable Christopher P. Staring, Judge

DISMISSED

Vernon E. Peltz

Tucson  
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Duane and Brenda Howell

Hinderaker Rauh & Weisman, P.L.C.  
By Adam Weisman and Robert Rauh

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H O W A R D, Chief Judge.

¶1 Appellants Paul and Rachel Kadlec and Duane and Brenda Howell appeal from the judgment in favor of appellees Daniel and Sherri Dorsey (Dorsey) following a bench trial concerning appellants’ claim of a prescriptive easement across Dorsey’s property. Because we do not have jurisdiction, we dismiss the appeal.

### **Factual and Procedural Background**

¶2 The relevant procedural background is undisputed. Appellants filed complaints asserting they had a prescriptive or “consensual” easement across the Dorsey’s property and that Dorsey had interfered with their use of the easement. Dorsey filed a third-party complaint against Laura Bradley, the previous owner of the property, alleging breach of contract, fraud, negligent misrepresentation, and rescission and requesting attorney fees. In her answer, Bradley requested attorney fees from Dorsey. The parties stipulated to a bifurcated trial between Dorsey and Bradley. After a bench trial between Dorsey and Bradley, the court took the matter under advisement until “completion of the bifurcated portion of this trial.”

¶3 Appellants and Dorsey each moved for partial summary judgment as to whom any recorded easement over the property was intended to benefit. The trial court granted appellants’ motion, Dorsey appealed and we affirmed. *Kadlec v. Dorsey*, 223 Ariz. 330, ¶¶ 1, 4, 223 P.3d 674, 675 (App. 2009). On review, our supreme court vacated the decision and remanded the case to the trial court. *Kadlec v. Dorsey*, 224 Ariz. 551, ¶ 13, 233 P.3d 1130, 1132 (2010).

¶4 Following a bench trial, the trial court held appellants had not proved a prescriptive easement by clear and convincing evidence and denied appellants’ motion

for reconsideration. On August 11, 2011, the court awarded attorney fees to Dorsey and entered an order it referred to as a final judgment. Appellants filed a notice of appeal and both parties filed appellate briefs in this court. On April 10, 2012, this court ordered the parties to file supplemental briefing addressing whether this court has jurisdiction to consider the appeal, and the parties filed a joint supplemental brief.

### **Discussion**

¶5 The parties agree that the trial court's August 11 judgment was not final because it did not resolve the third-party complaint. However, they attach what appears to be an order, entered after our request for additional briefing, dismissing the third-party complaint by stipulation between Dorsey and Bradley. The parties argue that because the third-party complaint now has been dismissed and because Dorsey has not been prejudiced, we have jurisdiction based on *Barassi v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (1981).

¶6 We have an independent duty to determine whether we have jurisdiction. *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997). Our jurisdiction is prescribed by statute, and we have no authority to entertain an appeal over which we do not have jurisdiction. *See Hall Family Props., Ltd. v. Gosnell Dev. Corp.*, 185 Ariz. 382, 386, 916 P.2d 1098, 1102 (App. 1995). Section 12-2101(A)(1), A.R.S., vests jurisdiction in this court for an appeal “[f]rom a final judgment,” which is one that “dispose[s] of all claims and all parties,” *Maria v. Najera*, 222 Ariz. 306, ¶ 5, 214 P.3d 394, 395 (App. 2009), *quoting Musa v. Adrian*, 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981). Although a court may enter a final judgment on fewer

than all the claims or parties, it may only do so “upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.”

Ariz. R. Civ. P. 54(b).

¶7 In the absence of a judgment pursuant to Rule 54(b), there exists only a limited exception to the final judgment rule that allows a notice of appeal to be filed after the trial court has made its final decision, but before it has entered a formal judgment, if no decision of the court could change and the only remaining task is merely ministerial.

*Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, ¶ 37, 132 P.3d 1187, 1195 (2006). Apart from these limited circumstances, a premature notice of appeal filed “in the absence of a final judgment . . . is ‘ineffective’ and a nullity.” *Craig v. Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d 624, 626 (2011), *quoting Smith*, 212 Ariz. 407, ¶ 39, 132 P.3d at 1195.

¶8 When the trial court entered the August 11 judgment, it had not determined whether Bradley was liable or allocated attorney fees between Dorsey and Bradley. Although the court’s decision on liability may have flowed from its decision on liability between appellants and Dorsey, at that time the court could have come to various decisions on the allocation of attorney fees. *See State ex rel. Corbin v. Tocco*, 173 Ariz. 587, 595, 845 P.2d 513, 521 (App. 1992) (“The determination of the reasonableness of an award of attorney’s fees is within the discretion of the trial court . . .”). Therefore, the court’s decision concerning the third-party complaint was not ministerial and did not fall within the limited exception established by *Barassi*. *See Smith*, 212 Ariz. 407, ¶ 37, 132 P.3d at 1195. Additionally, until the entry of a true final judgment, the order adjudicating

the rights between appellants and Dorsey could have been changed. *See* Rule 54(b) (“[T]he order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”). Appellants filed their notice of appeal in the absence of a final judgment, causing it to be ineffective and a nullity. *See Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d at 626.

¶9 The parties have provided no authority for the proposition that an order entered subsequently to a notice of appeal can cure a void notice. Instead, our case law requires a supplemental notice of appeal. *See Engel v. Landman*, 221 Ariz. 504, ¶ 16, 212 P.3d 842, 847-48 (App. 2009) (no jurisdiction over premature notice of appeal when not cured by supplemental notice of appeal); *cf. Raimey v. Ditsworth*, 227 Ariz. 552, ¶ 16, 261 P.3d 436, 442 (App. 2011) (void agreement not subject to ratification or disaffirmance); *State ex rel. Dep’t of Econ. Sec. v. Demetz*, 212 Ariz. 287, ¶ 12, 130 P.3d 986, 989 (App. 2006) (void marriage never comes into existence and cannot be ratified). Finally, our supreme court has emphasized that *Barassi* established only a narrow exception to the final judgment rule and that a premature notice is a nullity if it is not within the exception and is filed without a final judgment. *See Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d at 626 (reaffirming exception from *Barassi* a limited one). Thus, we do not have jurisdiction over this appeal.

### **Conclusion**

¶10 For the foregoing reasons, we dismiss the appeal for lack of jurisdiction. Dorsey requests costs and attorney fees pursuant to A.R.S. § 12-1103. We award Dorsey

his reasonable attorney fees on appeal and the costs of appeal upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* § 12-1103.

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Judge